NO. 89-123

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

~~WARRIOR & GULF NAVIGATION COMPANY,~~
PARKER TOWING COMPANY, INC.,
~~ET AL.,~~

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To The United States
Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals disregard the settled requirements of maritime law that a negligent defendant is entitled to exoneration based upon Act of God only if it can affirmatively show that the damages suffered are the result of inevitable accident which a proper exercise of human skill and precaution could not have prevented?

2. Did the Court of Appeals err in finding that the District Court was clearly erroneous in rejecting the United States' affirmative defense of act of God?

3. Should the Court of Appeals give an understandable explanation of its reasons, including a reference to the evidence or lack thereof, in rejecting the District Court's findings of fact as being clearly erroneous?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The below listed entities were parties to the proceedings in the Court of Appeals:

Warrior & Gulf Navigation Company

Parker Towing Company, Inc.

Southern Natural Gas Company

Hunt Oil Company

Insurance Company of North America

United States of America

Parker Towing Company, Inc. has no parent company and has the following subsidiaries and affiliates:

Mobile Drydock, Inc.

Pickens County Port, Inc.

Waterways Forest Products, Inc.

Cargo Handlers, Inc.

Mobile Shipbuilding and Repair, Inc.

Tombigbee Fleeting Service, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties Below	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	2
Statement of the Case	2
Argument	19
Conclusion	34

Appendices:

A. Adoption of Warrior & Gulf Navigation Co. Appendix A - Eleventh Circuit Opinion Dated February 6, 1989 ..... A-1

B. Adoption of Warrior & Gulf Navigation Co. Appendix B - Eleventh Circuit Denial of Petition for Rehearing Dated April 25, 1989 ..... A-2

C. Adoption of Warrior & Gulf Navigation Co. Appendix C - Southern District of Alabama Opinion Dated May 18, 1987 ..... A-3

Page

D. Warrior & Gulf Navigation Co. Trial Exhibit 33 - Graph of Upper Pool Elevations at Bankhead Lock and Dam A-4

E. Government Trial Exhibit 10C Graph of Upper Pool Elevations at Holt Lock and Dam A-5

F. Summary of Gate Elevations, Pool Elevations, and Cubic Feet Per Second Discharge at Bankhead Lock and Dam A-6

G. Summary of Gate Elevations, Pool Elevations, and Cubic Feet Per Second Discharge at Holt Lock and Dam A-7

H. Comparison of Holt Upper Pool Elevations as Reflected by Operator's Log and by Recording Graph A-8

I. Excerpts from U. S. Army Corps of Engineers' Manual E-1110-2-3600, entitled "Reservoir Regulation" .. A-9

TABLE Of AUTHORITIES

Page

CASES:

Amadeo v. Zant, 486 U.S. ____,
100 L.Ed.2d 249, 261-62 (1988) 30

Boudoin v. J. Ray McDermott & Co.,
281 F.2d 81, 88 (5th Cir. 1960) .. 19-20,28

Crumady v. The JOACHIM HENDRIK
FISSER, 358 U.S. 423, 429 (1959)
(dissenting opinion) 31

In Re United States, 425 F.2d 991,
995 (5th Cir. 1970) 20

Patapsco Scrap Corporation v.
Maryland Shipbuilding & Drydock Co.,
268 F.2d 817, 819 (4th Cir. 1959) 20

The LOUISIANA, 70 U.S. (3 Wall)
164, 173 (1865) 19

The ROB, 122 F.2d 312, 313
(2nd Cir. 1941) 20

The WILLIAM E. REIS, 152 F.
673, 676 (6th Cir. 1907) 20

Warrior & Gulf Navigation Company v.
United States, 864 F.2d 1550,
petition for rehearing denied,
875 F.2d 874 (11th Cir. 1989) 1,24,32

Zubik v. Zubik, 384 F.2d 267,
269-70 (3rd Cir. 1967) 20

STATUTES:

	Page
28 U.S.C., § 1254(1)	2
28 U.S.C., § 1333	4
46 U.S.C., §§ 471, et seq.	4

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit dated February 6, 1989, review of which is sought by this Petition for Writ of Certiorari, is captioned Warrior & Gulf Navigation Company v. United States and is reported at 864 F.2d 1550 and is reprinted as Appendix A to the petition filed by Warrior & Gulf Navigation Company ("WGN") and adopted as Appendix A hereto. A petition for rehearing and suggestion of en banc consideration was denied by the Eleventh Circuit on April 25, 1989, and that denial is reported at 875 F.2d 874 and is reprinted as Appendix B to the petition filed by WGN and adopted as Appendix B hereto. The opinion of the District Court for the Southern District of Alabama dated May 18, 1987, is unreported but is reprinted as Appendix C to the petition filed by WGN and adopted as Appendix C hereto.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit, the review of which is sought, was rendered on February 6, 1989. Petitions for rehearing were timely filed and were denied by order of the Eleventh Circuit dated April 25, 1989, and entered on that date. No order has been requested or entered granting an extension of time within which to petition for writ of certiorari. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this court by the provisions of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This appeal arises out of a decision of the United States District Court for the Southern District of Alabama following a lengthy non-jury trial of the issue of

liability only in five consolidated cases. Involved in the proceedings were claims by Warrior & Gulf Navigation Company ("WGN"), Hunt Oil Company ("Hunt"), Southern Natural Gas Company ("Sonat"), Insurance Company of North America, and Parker Towing Company, Inc. ("Parker") against the United States for damage resulting from the domino effect of the M/V CADDO's tow's colliding with the U. S. Highway 82 By-Pass Bridge, which spanned the Black Warrior River downstream from Holt Lock and Dam. The claimants, other than WGN, had also asserted claims for these damages against WGN, but all of these claims except Parker's were settled prior to trial. Parker also asserted a claim against the United States for the loss of its barge PTC 135 and her cargo as a result of that barge's being broken away from her moorings upstream from Holt by strong currents, whose force and effect were greatly increased by the negligence of

the United States in the operation of the Bankhead and Holt Dams on the Black Warrior River. Other claims between Parker and the United States were also asserted but they are not relevant to this petition for writ of certiorari. The District Court had jurisdiction of all cases pursuant to 28 U.S.C. § 1333 and specific jurisdiction against the United States as a defendant pursuant to 46 U.S.C. §§471, et seq.

After a lengthy trial involving many witnesses and exhibits, Senior Judge Daniel H. Thomas found that the CADDO's tow's striking the bridge and the PTC 135's breaking away from her moorings were caused by the sole negligence of the United States in the operation of its locks and dams. On appeal, the Court of Appeals for the Eleventh Circuit reversed Judge Thomas' opinion, holding that he was clearly erroneous in determining that the negli-

gence of the United States proximately caused the damages, the Court of Appeals instead substituting its finding that the unprecedented rain was the inevitable cause of the chain of events in the case. Petitions for rehearing were filed and denied.

The claims in this litigation all arise out of damages to vessels and shoreside facilities which occurred on the morning of December 3, 1983, on the Black Warrior River in the general vicinity of Tuscaloosa, Alabama. The Corps of Engineers operates the following three facilities on the Black Warrior River in this area, which are listed in order from upriver to downriver: Bankhead Lock and Dam, located at Mile 365; Holt Lock and Dam, located at Mile 347, and Oliver Lock and Dam, located at Mile 338. In addition to the locks which allow vessels to

navigate the river, Bankhead and Holt have spillway gates which can be raised and lowered to regulate the height of the river and the flow of the current, whereas Oliver has a fixed dam with no moveable spillway gates. The Brookwood (Drummond) facility where Parker's barge PTC 135 had been moored for over a week is located seven miles upstream from Holt at Mile 354, and the U. S. Highway 82 By-Pass Bridge, which WGN's Tug CADDO's tow struck, is located at Mile 341.5, which is five and one-half miles downstream from Holt.

On the night of December 2-3, 1983, the Tug CADDO, with six barges in tow, was the third of three WGN tugs to proceed downstream through Holt Lock, departing the lock at sometime between 1:45 a.m. and 2:03 a.m. She struck the bridge at 2:30 a.m., resulting in the breakup of her tow. While other WGN tugs in the vicinity were

assisting the CADDO, their barges broke loose, and, as a result, WGN lost numerous barges and their cargoes, and damage was caused to Sonat's and Hunt's facilities downstream from Oliver and also to two of Parker's barges, the PTC 216 and PTC 235, which were in a tow just downstream from Oliver. The trial court found that the damages of WGN, Hunt, and Sonat, and Parker's damages to the PTC 216 and PTC 235 all stemmed from the domino effect of the CADDO's tow's colliding with the bridge and its breakup. (Conclusion of Law 6) (Future references to the findings of fact and the conclusions of law which are contained in the Record at R1-27 and in Appendix C hereto will be cited as "F of F" and "C of L".) The basic facts as stated above have not been disputed by any party on appeal, although there is, of course, dispute as to whether or not the government's negligence was the cause of the

CADDO's tow's colliding with the bridge. In its opinion, the Eleventh Circuit reversed the trial court's award of all damages to Parker against the United States, including the damages to the PTC 216 and PTC 235. With respect to its claim for the damages to the PTC 216 and PTC 235, Parker incorporates herein the statement of facts of WGN in its petition for writ of certiorari.

The language contained in C of L 6 taken by itself implies that all of Parker's claims resulted from the domino effect of the CADDO's tow's colliding with the bridge, and the Court of Appeals apparently accepted this implication as being correct. It is, however, totally incorrect as is reflected by the language contained thereafter in C of L 8 wherein the district court stated in part as follows:

> This leaves the problem of Barge PTC 135 and the cost incurred in its removal from the spillway gates at Holt. [The United States had claimed recovery for this cost but abandoned that claim in its appellate brief.] . . . The Court finds, however, that the negligence of the United States in the operation of the spillway gates proximately caused the breakaway of the PTC 135. Parker is therefore entitled to recover in full for its damages incurred in connection with the loss of the PTC 135 and its cargo.

It is blatantly obvious that the CADDO's tow's striking the bridge five miles downstream from Holt could not have caused the PTC 135 to break away from her moorings seven miles upstream from Holt. Instead, the PTC 135 was broken from her mooring by the strong currents at Brookwood, the strength of which was substantially increased by the negligence of the Corps of Engineers in operating the spillway gates at Bankhead and Holt in a

manner contrary to its established regulations by negligently and unnecessarily storing large amounts of water above the dams and then rapidly opening the gates and releasing this stored energy.

Attached hereto as Appendices D & E are copies of WGN Ex. 33 and Government Ex. 10C, respectively, which reflect the heights of the Bankhead and Holt upper pools (also refered to as Bankhead and Holt Lakes) at relevant times. WGN Ex. 33 reflects that Bankhead Lake commenced rising at 6:00 p.m. on December 2nd and rose steadily and continuously until midnight for a height of approximately .8 of a foot. This substantial rise in Bankhead Lake, which is approximately three times as large as Holt Lake, caused the lock tender who went off duty at 11:00 p.m. on December 2nd to advise his relief that they had a "runaway river", that he had

been opening gates since 10:15 p.m., and that additional gates would have to be opened. (R5--926-27) Maximum opening of the gates at Bankhead is 13.5 feet (WGN Ex. 7), but, despite this early knowledge, the gates at Bankhead were not opened above three feet until almost 1:00 a.m. and were not opened to full flow until 4:18 a.m. (WGN Ex. 9) The discharge rate at an opening of three feet at Bankhead is approximately 56,500 cubic feet per second ("cfs"), whereas the discharge rate at full flow is 189,900 cfs. (WGN Ex. 7) Appendices F & G are compilations of the gate openings, upper pool elevations according to the gate operator's logs, and cfs discharges of Bankhead and Holt, respectively, and Appendix H is a comparison of the Holt pool elevations recorded in the operator's log with the Corps' recording graph. The data upon which these appendices is based is contained in WGN Exs. 7,

9, 11, and 13 and Government Ex. 10C.

The government's manuals for the operation of Bankhead and Holt provide for continuing communication between Bankhead and Holt to "[aid] in the operation of Holt Lock and Dam by providing an indication of expected inflows" (WGN Ex. 7, ¶ 6-3) and state that the exchange of data "may be helpful in anticipating gate operating requirements." (WGN Ex. 11, ¶ 26) Despite these provisions, "[T]he testimony of the Corps witnesses at trial was confusing and conflicting as to when Bankhead warned Holt that an unprecedented volume of water was on the way south from Bankhead. The third shift lock tender at Holt testified that Bankhead did not warn him of its actions [substantial gate raisings] until 'it was almost too late' and the water had already hit him by surprise." (F of F 40)

The substantial rise at Holt began around 11:00 p.m., and by 3:00 a.m. the pool there had risen to a peak of 190.2 feet (Government Ex. 10C), which is 3.2 feet above the maximum reservoir height of 187 feet. (WGN Ex. 11, ¶ 23) Holt is designed so that "the proper manipulation of the gates will maintain the pool at [187] for all inflows up to 393,000 cfs." The manual further provides that the "gates will be operated . . . in order to maintain the reservoir between elevations 186 and 187 except during floods with inflows in excess of spillway capacity." (WGN Ex. 11, ¶26) The inflow into Holt Lake from Bankhead never exceeded 152,000 cfs prior to 3:00 a.m. (Appendix C, WGN Ex. 9, & WGN Ex. 7, charts 9-13). The inflow into Holt Lake was about the same from rain as it was from Bankhead except possibly for the very early hours of the morning when the exhibits reflect much lower discharge

rates. (R4--740-41, R6--1468) Consequently, during the time that Holt Lake was rising, the total maximum inflow into Holt Lake of slightly over 300,000 cfs was substantially below the discharge capacity of 393,000 cfs.

The lock operator at Holt, however, neglected to open his gates sufficiently early as required by the manuals in order to maintain Holt Lake at or below the maximum permitted elevation. By 1:40 a.m., he had raised his gates to a height of only six feet, producing a discharge of 99,770 cfs. (Appendix G, WGN Ex. 13 & WGN Ex. 11, Charts 7-11) At 2:20 a.m., the gates were raised to twelve feet at Holt, producing a discharge of 199,460 cfs and were ultimately raised at 4:30 a.m. to the maximum opening utilized that night of an average of slightly over seventeen feet, producing a discharge of 264,340 cfs. These records

unquestionably supported and in fact demanded the trial court's finding that the operator at Holt "violated the undisputed Corps requirement that the gates be opened as soon as the upper pool exceeds the elevation of 187" and that "Holt was not operated as a run-of-the-river dam is supposed to be operated during this critical period of time" as the operator was devoting the time "to locking three southbound Warrior & Gulf tugboats through Holt, ignoring the flood descending from Bankhead." (F of F 43) After locking the last boat through at 1:40 a.m., the operator discovered that his pool had risen alarmingly and immediately began opening gates as fast as he could. (F of F 43) Even after the pool at Holt had crested at 3:00 a.m., the Holt operator continued to open gates from approximately 13 feet to approximately 17 feet, increasing the discharge from approximately 217,000 cfs to

approximately 264,000 cfs.

The maximum discharges from Bankhead and Holt occurred from approximately 4:30 a.m. to 6:00 a.m. (Appendices F & G), and the current at Brookwood was reported to be ten m.p.h. (R4--833-35) at 5:30 a.m. It was probably well after 3:00 a.m. that the PTC 135 most likely broke loose. (Government's Appellant Brief at 30-31) At 6:00 a.m., the PTC 135 struck Holt Dam seven miles downstream from Bankhead where she had been moored. (F of F 49)

Dr. Neil Grigg, a highly qualified hydrologist, testified that the lock operators at Holt and Bankhead could have brought their pool levels down below the maximum level earlier by opening the gates earlier which would have reduced the necessity to have opened the gates as high as they did later in the morning between

3:00 a.m. and 6:00 a.m. Opening the gates earlier would have avoided the necessity to open the gates so high later, resulting in substantially less current at Brookwood than did in fact occur between 3:00 a.m. and 6:00 a.m. (R4--676-683, 771-774) Joe Henline, an independent tug boat pilot, testified that big openings at Holt and Bankhead will create very strong currents between the two and that the current gets strong, not when the river is rising, but when the gates are opened to allow the current to start moving through. (R3--395-401) Even Mr. Rounsaville, the Corps' star company-line witness, acknowledged that water was stored above Holt until approximately 3:00 a.m. (R6--1229-30) and that from 4:30 a.m. to 6:00 a.m. the gates were opened very wide, resulting in the dramatic falling of the pools and the passing of a lot more water than would have passed

through if the dams had not been there. (R6--1278-79)

The Government did not offer any evidence at all to show what the currents would have been in the river where the PTC 135 broke loose between Holt and Bankhead if the Government had operated its dams properly as required by its own regulations. In fact, although the Government's expert hydrologist Dr. Peck modeled the river, not only from Holt downstream to Oliver, but also from Holt upstream to Bankhead (R6--1432-33, 1433-35), he did not testify with respect to the currents or conditions between Holt and Bankhead, where the PTC 135 incident occurred, and the Government offered into evidence only his model below Holt and not his model above Holt.

ARGUMENT

In reaching its decision, the Court of Appeals totally ignored the extensive maritime jurisprudence on the subject of act of God, or inevitable accident, relying instead upon two Alabama decisions, of which one was not cited in any appellate brief and the other was cited for a totally different proposition than that asserted by the court. The United States Supreme Court in The LOUISIANA, 70 U.S. (3 Wall) 164, 173 (1865) clearly established that a defendant relying upon inevitable accident, or act of God, must show that the accident was "the result of inevitable accident, or a vis major, which human skill and precaution, and a proper display of nautical skill could not have prevented." The Fifth Circuit in Boudoin v J. Ray McDermott & Co., 281 F.2d 81, 88 (5th Cir. 1960) stated as follows:

> . . . [T]he law is clear that "the burden 'is heavily upon the [defendant] asserting such a defense,' . . . Such [defendant] 'must exhaust every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required.'"

These basic principles have been previously applied uniformly by the courts of appeals in maritime cases. The ROB, 122 F.2d 312, 313 (2nd Cir. 1941); Zubik v. Zubik, 384 F.2d 267, 269-70 (3rd Cir. 1967); Patapsco Scrap Corporation v. Maryland Shipbuilding & Drydock Co., 268 F.2d 817, 819 (4th Cir. 1959). In Re United States, 425 F.2d 991, 995 (5th Cir. 1970); The WILLIAM E. REIS, 152 F. 673, 676 (6th Cir. 1907). The present case contains a factual variation from most act of God decisions, because, in most of those cases, the party asserting act of God as a defense is the owner of a vessel which has broken away from her

moorings and which is presumed to be negligent since its moving vessel has struck a fixed object. In the present case, the situation is reversed in that Parker, the owner of the PTC 135 which broke away from her moorings, was found by the trial court not to be guilty of negligence (C of L 10), and the Government not only was found to be negligent by the trial court but did not dispute that negligence in its appellate brief, contending only that its negligence had not proximately caused the damages. Because of this unique situation, caution is required in order to recognize that the burden of proving act of God is on the party who relies on the act of God defense, which may not be the drifting vessel.

In its opinion, the Eleventh Circuit merely states, relying upon an Alabama decision, that a negligent party will be

exonerated from liability if the act of God would have produced the same damage irrespective of the party's negligence. The opinion does not contain any discussion of what proof exists in the record to support the Government's affirmative defense. The opinion instead only asserts in conclusionary fashion that the unprecedented rain rather than the Government's negligence was the inevitable cause of the chain of events. Furthermore, the opinion fails to recognize in any manner that the incident involving the PTC 135 was not a part of the chain of events resulting from the collision of the CADDO's tow with the bridge.

The Eleventh Circuit repeatedly refers to the "unprecedented rainfall" as if the mere fact that the rainfall was unprecedented provided a defense to the United States. Pursuant to the applicable

maritime law, however, the question is not whether the rainfall was unprecedented but rather whether the Corps of Engineers personnel could have prevented the damage by the proper exercise of reasonable care. As set forth above, the trial court found that "the negligence of the United States in the operation of the spillway gates proximately caused the breakaway of the PTC 135." (C of L 8) The United States did not seriously challenge the district court's finding that it was negligent, and the Eleventh Circuit did not find that the trial court was clearly erroneous in concluding that the United States was negligent.

The Eleventh Circuit's opinion contains no discussion of the Corps of Engineers' operation of the dams and what the Corps could have done to avoid the damages. The opinion does contain the

statement that "the flow out of the dam was matching the flow into the lake above the dam," 864 F.2d at 1554, but this statement is in direct conflict with the undisputed evidence as to the inflows and discharges as detailed above in the statement of facts with respect to the periods of time relevant to the breakaway of the PTC 135 from her moorings. If the outflows had equalled the inflows, the levels of the lakes would have remained constant, but they varied greatly, exceeding the maximum allowable elevations, as is visibly demonstrated by the graphs contained in Appendices D and E. Basically, the Court of Appeals simply concluded without any informative discussion that "the unprecedented rain, rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system, was the inevitable cause of the chain of events in this case." 864 F.2d at 1554. Obviously,

the rainfall was the initial motivating force in causing the PTC 135 to break away from its moorings, just as hurricanes and other natural phenomena were the initial motivating forces in all of the inevitable accident cases cited above. In those cases, however, the courts properly analyzed the evidence to determine whether or not the negligent defendants had carried their heavy burden of proving that they did all they reasonably could to prevent the damage.

Although the rainfall was a very substantial factor in producing the currents in the river, clear and substantial evidence, as set forth in the statement of the facts, demonstrates that the Corps of Engineers' negligence in improperly storing tremendous quantities of water above the dams rather than allowing them to flow through as required by a run-

of-the-river project and in subsequently releasing this stored energy by opening the gates wider than should have been necessary resulted in a substantial increase in the current. In contrast to this very convincing evidence which was clearly accepted by the trial judge, who saw and heard the witnesses testify, the United States offered no evidence at all to show what the currents and forces involved would have been if the government had operated the locks and dams in the manner required by its own regulations and by the exercise of due care.

Furthermore, while the rainfall may have been unprecedented, it clearly was not unforeseen, and the Corps of Engineers specifically recognized the great potential for damage that could result from improper operation of the gated spillways during heavy floods and storms. In the Corps of

Engineers' Manual EM-1110-2-3600 (WGN Exhibit 15) entitled "Reservoir Regulations," a portion of which is reproduced as Appendix I, the Corps specifically notes that experience has shown that significant damages may arise when reservoir releases during floods are greater than would have occurred under natural conditions prior to construction of the reservoir. Accordingly, the manual states that one of the objectives of the operation of the spillways is to prevent peak rates of reservoir release that would exceed the runoff conditions that would have occurred without the construction of the reservoir. To accomplish this objective, the manual provides for the opening of the spillway gates before the reservoir has exceeded its storage capacity in order to limit the increase in outflow to an acceptable value. In light of the Corps' recognition of the potential damage that could result from the

operation of the dams, it is certainly clear that its lock operators had the same duty to exercise due care to prevent damage as the ship master in Boudoin, supra, 281 F.2d at 84-85. Nevertheless, the lock operators were not even familiar with the written manuals regarding the operation of the dam and had not been trained in accordance with the Corps of Engineers' mandates contained therein. (F of F 30)

A review of the trial court's opinion reflects that the court conducted a detailed analysis of the evidence presented with regard to the Corps of Engineers' negligence and found that that negligence proximately caused the breakaway of the PTC 135. The very convincing testimony of Dr. Grigg, the highly qualified hydrologist, and Joe Henlein, an experienced independent tug boat pilot, virtually demanded this conclusion. Their testimony was further

supported by the acknowledgment of the Corps of Engineers' Mr. Rounsaville that the Corps' actions resulted in a dramatic falling of the pools and the passage of a lot more water through the dams during the time of the PTC 135 incident than would have occurred prior to the construction of the dams. In opposition to this overwhelming evidence, the Corps of Engineers offered nothing to carry its heavy burden of proof and even declined to present any testimony from its expert hydrologist with respect to currents or conditions at the area where the PTC 135 incident occurred.

The Eleventh Circuit's opinion does not set forth in any meaningful manner the facts or evidence upon which the court based its faulty determination that the trial court was clearly erroneous with respect to the PTC 135. This Court recently stated in reversing another

opinion of the Eleventh Circuit in which it had held the trial court's findings clearly erroneous as follows:

> . . . Indeed, the Court of Appeals identified no evidence in the record--aside from the fact that the memorandum eventually was discovered--that contradicted the District Court's conclusions about the concealment and availability of the memorandum. The Court of Appeals therefore should not have set aside as clearly erroneous the District Court's findings on these matters.

Amadeo v. Zant, 486 U.S. ___, 100 L.Ed.2d 249, 261-62 (1988). There are several valid reasons why Courts of Appeals should identify the evidence or lack thereof in the record upon which they base a reversal of the trial court's findings. In the first place, common courtesy to the district judge, who in this case had spent substantial time hearing the evidence and writing his forty page opinion, demands such an explanation. This point was

clearly recognized as applicable even to the Supreme Court by Justice Harlan in his dissent in Crumady v. The JOACHIM HENDRIK FISSER, 358 U.S. 423, 429 (1959) (dissenting opinion), wherein he stated as follows:

> When this Court reverses a Court of Appeals, particulary on issues of fact, I think the lower court is at least due an understandable explication of the reasons.

Such common courtesy should also be extended to the litigants involved, and to their counsel, who deserve an explanation for the court's action. Clearly, such an explanation should create a higher regard by the public in general for the functions and actions of the Courts of Appeals and the judicial system in general. Furthermore, in this particular case, and possibly in many others, if the Court of Appeals had attempted to set forth the basis of its

ruling rather than merely expressing an unfounded conclusion, it very possibly would have discovered its own error as it would have realized that the evidence in this case does not support the visceral feeling upon which it must have based its conclusion. The mere recitation by the Court of Appeals of the talismanic phrase, "after a thorough review of the record", 864 F.2d at 1554, should not deprive Parker and the other petitioners of their right to reinstatement of the findings of fact and judgment thereon in their favor, which were unquestionably more than adequately supported by a permissible view of the evidence.

With respect to the reversal of the trial court's finding of liability on behalf of the Government for the damages resulting from the CADDO incident, including the damage to the PTC 216 and PTC

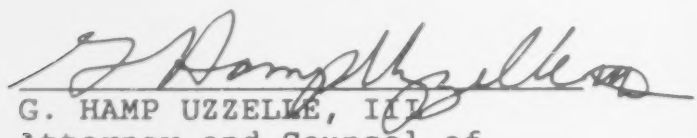
235, Parker relies upon the arguments of WGN in its Petition for Writ of Certiorari.

CONCLUSION

A major underlying issue presented by this petition is a factual matter which is normally not an appropriate subject for consideration by the Supreme Court. Unfortunately, however, the Court of Appeals for the Eleventh Circuit exceeded the bounds of its scope of review in substituting its own finding, which was not supported by the evidence, for the finding of the District Court, which was clearly supported by the evidence. Furthermore, in making this unwarranted substitution of its own findings of fact, the Court of Appeals totally neglected to provide an explanation for its finding or to cite the evidence or lack thereof in support of its finding. In the federal judicial system, the District Court is the appropriate court to make findings of fact, and petitioners respectfully request the Supreme Court to exercise

exercise its supervisory authority over the Court of Appeals to correct its improper usurpation of the District Court's function. Additionally, the Court of Appeals failed to follow the clear and settled body of maritime law with respect to the affirmative defense of act of God and the burden of proof with respect thereto, and petitioner respectfully requests this Court to reinstate those settled maritime principles and eliminate the present conflict between the decision of the Eleventh Circuit and the decisions of other Courts of Appeal and the Supreme Court on this matter.

Respectfully submitted,



G. HAMP UZZELLE, III
Attorney and Counsel of
Record for Petitioner Parker
Towing Company, Inc.

APPENDIX A

Parker adopts Appendix A to the Petition for Writ of Certiorari filed by Warrior & Gulf Navigation Co. as its Appendix A.

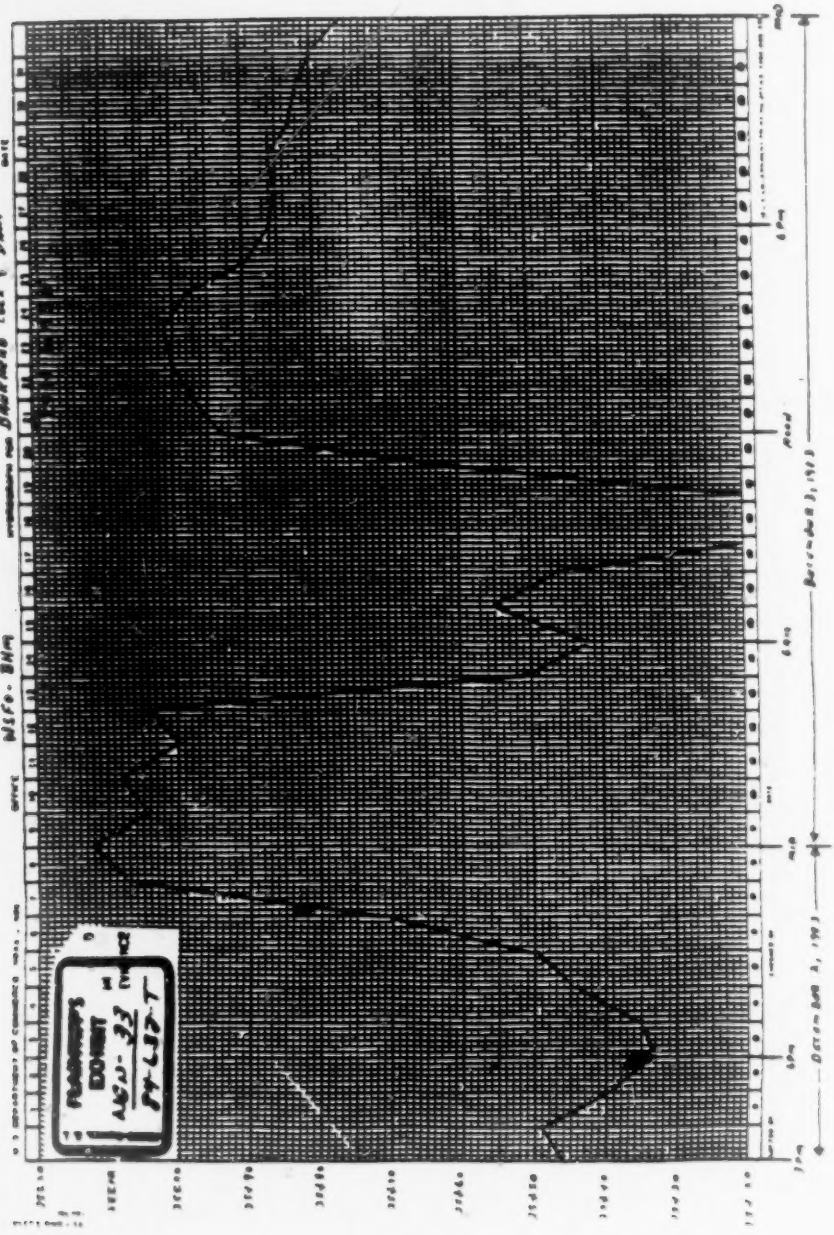
APPENDIX B

Parker adopts Appendix B to the Petition for Writ of Certiorari filed by Warrior & Gulf Navigation Co. as its Appendix B.

APPENDIX C

Parker adopts Appendix C to the Petition for Writ of Certiorari filed by Warrior & Gulf Navigation Co. as its Appendix C.

APPENDIX D



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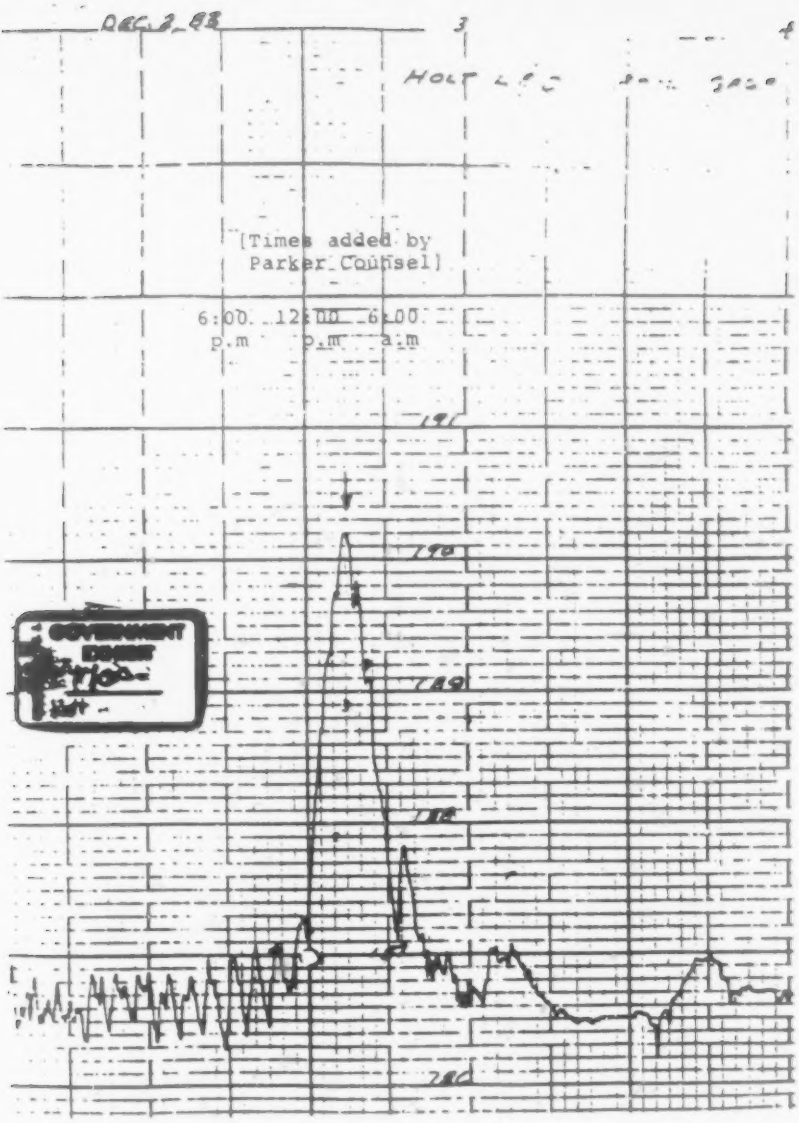
APPENDIX E



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BANKHEAD

TIME	GATES	AVERAGE GATES OF 21 GATES	UPPER POOL ELEVATION PER OPERATOR'S LOG	CUBIC FEET PER SECOND DISCHARGE
2226	6 at 1'	.29	254.95	6,200
2313	4 at 3', 16 at 1'	1.33	255.05	27,146
2339	12 at 3', 8 at 1'	2.10	255.12	42,215
0015	20 at 3'	2.86	255.08	56,499
0055	6 at 6', 14 at 3'	3.71	255.15	72,471
0140	17 at 6', 3 at 3'	5.29	255.09	100,676
0208	20 at 6'	5.71	255.15	108,084
0219	2 at Full, 18 at 6'	6.43	255.15	120,516
0259	8 at Full 12 at 6'	8.57	255.15	151,652
0336	13 at Full, 7 at 6'	10.36	255.13	165,539
0418	21 at Full	13.50	255.10	189,900
0520	19 at Full, 2 at 6'	12.79	254.68	173,275
0624	17 at Full, 4 at 6'	12.07	254.67	168,768

HOLT

TIME	GATES	AVERAGE GATES	UPPER POOL ELEVATION PER OPERATOR'S LOG	CUBIC FEET PER SECOND DISCHARGE
2240	3 at 1'	.21	187.0	4,050
2340	9 at 1', 5 at 2'	1.36	187.4	25,780
0015	14 at 4'	4.00	187.2	66,190
0140	14 at 6'	6.00	187.4	99,770
0200	14 at 10'	10.00	187.9	165,950
0220	14 at 12'	12.00	188.5	199,460
0300	4 at 16', 10 at 12'	13.14	188.9	216,942
0340	9 at 16', 5 at 12'	14.57	189.7	237,396
0430	4 at 20', 10 at 16'	17.14	189.2	264,340
0600	4 at 20', 10 at 16'	17.14	187.7	258,560
0615	2 at 20', 12 at 16'	16.57	187.3	252,650

HOLT ELEVATIONS

DATE	TIME	OPERATORS' LOG	RECORDING GRAPH	DIFFERENCE
12-2-83	0600	186.6	186.6	0
	2240	187.0	186.8	+.2
	2340	187.4	187.3	+.1
12-3-83	0015	187.2	187.9	-.7
	0140	187.4	189.2	-1.8
	0200	187.9	189.4	-1.5
	0220	188.5	189.8	-1.3
	0300	188.9	190.2	-1.3
	0340	189.7	189.7	0
	0430	189.2	189.1	+.1
	0600	187.7	187.7	0
	0615	187.3	187.4	-.1
	0830	187.0	187.1	-.1
	0900	186.9	186.9	0
	0940	186.9	186.9	0

APPENDIX I

EXCERPT FROM

UNITED STATES CORPS OF ENGINEERS'

MANUAL EM-1110-2-3600

ENTITLED RESERVOIR AND REGULATION

4-05. OPERATION OF GATED SPILLWAYS A. General. . . .

Until recent years it was common practice in the study of gated spillways to assume that the reservoir level would not be permitted to rise above the static-full-pool elevation near the dam until all spillway gates were open, after which reservoir outflow would be uncontrolled as long as inflow exceeded the capacity of the spillway at static-full-pool elevation. However, experience in the operation of gated spillways has shown that significant flood damages may arise because of the fact that reservoir releases under this plan of operation may be larger during floods cccurring when the reservoir is full, or near full, than would have been the case under natural conditions before construction of the reservoir. The operation of gated spillways because of sudden increases in the rate of outflow

may result in damaging flood wave. For these reasons, insofar as practicable, reservoirs controlled by gated spillways should be designed and operated to accomplish the following objectives during periods when the reservoir is filled or nearly filled:

(1) Peak rates of reservoir release during damaging floods should not exceed peak rates of the corresponding floods that would have occurred under runoff conditions prevailing before construction of the reservoir.

(2) The rate of increase in reservoir releases during a significant increment of time should be limited to values that would not constitute a major hazard to downstream interests.

b. Methods of Operation. One of the two basic procedures discussed below, or combination thereof, may be followed in accomplishing the objectives stated above:

(1) When predictions indicate that anticipated runoff from a storm will appreciably exceed the storage capacity remaining in the reservoir, the opening of spillway gates will be initiated before the reservoir has filled, and will be scheduled to limit the rate of increase in outflow to an acceptable value. This method of operation

accomplishes the objectives stated in the preceding paragraph, but with some sacrifice in the flood control effectiveness of storage capacity below the static-full-pool level.

(2) As an alternative to the procedure outlined above, "induced surcharge" storage above the static-full-pool level may be utilized to exercise partial control over outflow rates after the reservoir has filled to the static-full-pool level. . . . [Emphasis added.]

(2) (2) (2)

Supreme Court, U.S.
FILED
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Nos. 89-120, 89-122, and 89-123

In the Supreme Court of the United States

OCTOBER TERM, 1989

SOUTHERN NATURAL GAS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

WARRIOR & GULF NAVIGATION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

PARKER TOWING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in overturning as clearly erroneous the district court's determination that the United States Army Corps of Engineers' operation of lock and dam facilities on the Black Warrior River in Alabama was the proximate cause of the damages incurred by petitioners.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985)	6, 9
Just v. *Chambers*, 312 U.S. 383 (1941)	10
Levinson v. *Deupree*, 345 U.S. 648 (1953)	10
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948)	6, 9

Statutes and rule:

Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*	4
33 U.S.C. 702c	2
Fed. R. Civ. P. 52(a)	9

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-120

SOUTHERN NATURAL GAS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 89-122

WARRIOR & GULF NAVIGATION COMPANY, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 864 F.2d 1550.[1] The district court's findings of fact and conclusions of law (Pet. App. A13-A45) are unreported.

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[1] "Pet. App." refers to the appendix to the petition in No. 89-120.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1989. Petitions for rehearing were denied on April 25, 1989 (Pet. App. A46). The petitions for a writ of certiorari were each filed on July 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Army Corps of Engineers operates a system of four lock and dam facilities on the Black Warrior River in and around Birmingham and Tuscaloosa, Alabama. The Corps of Engineers uses these "run-of-the-river facilities" to facilitate navigation on the river; the facilities are neither designed nor used for flood control.[2] See generally 33 U.S.C. 702c. Pet. App. A4-A5, A14-A20.

During the evening and early morning of December 2 and 3, 1983, "an unprecedented rainfall in the area of Birmingham and Tuscaloosa, Alabama" caused the level of the nearby Black Warrior River to rise rapidly, thereby creating severe flood conditions. Pet. App. A20. On that night, three towboats owned by petitioner Warrior & Gulf Navigation Company—the *Muskogee,* the *Apalache,* and the *Caddo*—were proceeding downstream toward the Holt Lock. Each of these vessels was pushing six loaded coal barges. Meanwhile, another Warrior & Gulf towboat, the *Tahome,* was proceeding upstream with six empty barges. Pet. App. A6, A21-A22.

As the *Caddo* travelled down the river, it collided with the Highway 82 Bypass Bridge, which spanned the river

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[2] The facilities on the Black Warrior River include the Bankhead Lock and Dam, the Holt Lock and Dam (roughly 18 miles downstream of Bankhead), and the Oliver Lock and Dam (roughly 8.5 miles downstream of Holt at Tuscaloosa). See Pet. App. A15-A20.

some five miles below the Holt Lock. The collision broke up the *Caddo*'s six-barge tow; five of the barges floated free, the sixth sank. The *Caddo* radioed for help. The *Apalache* and the *Tahome,* which were above the Oliver Lock, responded to the call and proceeded upstream. Eight loaded barges (two from the *Muskogee,* which had proceeded below the Oliver Lock, and all six of the *Apalachee*'s), and two empty barges (from the *Tahome*) were left moored, but unattended, just above the Oliver Lock. Pet. App. A6-A7, A21-A22.

While the *Caddo, Apalache,* and *Tahome* worked to retrieve the *Caddo*'s tow, all eight of the loaded barges moored above the Oliver Lock broke loose and proceeded downstream over the top of the Oliver Dam. These runaway barges then struck and broke loose the four loaded barges (the remainder of the *Muskogee*'s tow) that had been moored below the Oliver Lock. The drifting Warrior & Gulf barges then struck and damaged a tow being pushed by the *Thelma Parker,* which was owned and operated by petitioner Parker Towing Company, Inc. Pet. App. A7, A22-A23.

Twelve of the loaded Warrior & Gulf barges ultimately sank. But first, one or more of the barges drifted into the Hunt Oil Company Dock, located downstream from the Oliver Lock at the Tuscaloosa refinery. The barge (or barges) then ruptured, severed, and separated two submarine gas pipelines running across the river; petitioner Southern Natural Gas Company owned these pipelines. Pet. App. A7, A22-A23.

In a separate incident occurring on the Black Warrior River on the night of December 2, a loaded barge owned by petitioner Parker Towing Company, which was moored above the Holt Lock, broke loose and drifted into the spillway gates of the Holt Dam. Although the barge did not damage the dam, it prevented the Corps of Engi-

neers from closing three of those gates. Parker Towing promptly abandoned the barge to the United States. About one week later, however, as the Corps of Engineers was lowering the level of Holt Lake in order to remove the barge, another Parker Towing barge, which was in the area, grounded on the lake bottom and fractured in the middle. Pet. App. A7-A8, A23-A24.

2. Petitioners filed separate actions against the United States under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, in the United States District Court for the Southern District of Alabama. Each petitioner alleged that, during the rainstorm on December 2 and 3, 1983, the Corp of Engineers had negligently operated the lock and dam facilities on the Black Warrior River, and that this mishandling proximately caused the damages incurred, namely, the sunken and fractured barges and the severed pipelines.[3] The district court consolidated the actions and, in September 1986, held a bench trial limited to the issue of liability. Pet. App. A4, A13; Gov't C.A. Br. 2-3.

3. The district court concluded that the Corps of Engineers' negligent operation of lock and dam facilities on the Black Warrior River was the proximate cause of the damages incurred by petitioners. Pet. App. A13-A45. The district court found, among other things, that the Holt and Bankhead facilities were part of a system of locks and dams operated by the Corps of Engineers, one purpose of which was to "provide a navigable channel in the Black Warrior River two hundred feet wide and nine feet deep." *Id.* at A15. The court further found that the Corps of Engineers had negligently operated Holt and Bankhead on

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[3] The United States filed a separate action against petitioner Parker Towing Company for the salvage costs of the barge abandoned in Holt Dam. The district court denied that claim. See Pet. App. A44. The United States sought no review of that ruling. See *id.* at A12 n.10.

the night of December 2, because, in response to a rapidly rising river, the Corps had not sufficiently opened the spillgates to counteract the rise of the river and its increased velocity. See *id.* at A26-A38.

The district court then found that the Corps of Engineers' negligence created a "sudden increase in current" below the Holt Dam, which caused the *Caddo* and its tow to collide with the Highway 82 Bypass Bridge. Pet. App. A41; see *id.* at A35-A38. The court found that "[t]he damages claimed by [petitioners] all stem from the domino effect of the CADDO's tow colliding with the * * * Bridge and its break-up." *Id.* at A43. Since the Corps of Engineers was responsible for the initial collision, the court concluded that it was solely liable for all the resulting damages. The court refused to consider whether each petitioner's damages could be attributed to an intervening cause, such as leaving barges unattended on the river. In the court's view, that issue "is of no import" because "[a]ll parties, save the United States, have settled with [petitioner Warrior & Gulf]." *Id.* at A43-A44.[4]

The district court also refused to excuse the Corp of Engineers from liability "on the premises that the losses suffered by [petitioners] were the result of an Act of God for which the Government is not responsible." Pet. App. A44. Having found "human error in the operation of the gates," the court concluded that "the Government has not sustained its burden of proof entitling it to exoneration on this theory." *Id.* at A45.[5]

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[4] The court of appeals noted this inaccuracy in the district court's opinion. Parker Towing Company had not settled its claim against Warrior & Gulf. See Pet. App. A11 n.9; Gov't C.A. Br. 4 n.1.

[5] The district court also refused to enforce the release from liability contained in "Clause No. g." of the permits issued by the Corps of Engineers to petitioner Southern Natural Gas Company and Hunt Oil Company for the construction of the structures that were damaged

4. The court of appeals unanimously reversed, holding that "the district court clearly erred by concluding that the actions of the United States were the proximate cause of the *CADDO* casualty and, thus, of all the damages suffered by [petitioners]." Pet. App. A8. It first recognized that the district court's proximate cause finding was subject to a narrow standard of review—"whether that finding is clearly erroneous." *Id.* at A9 & n.5 (citing *Anderson* v. *City of Bessemer City,* 470 U.S. 564, 573 (1985), and *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948)).[6]

Turning to the record, the court of appeals agreed with the district court's finding that "the excessive rain on the night of December 2d and in the morning of December 3, 1983, was unprecedented." Pet. App. A9-A10. In this regard, the court analogized the unprecedented rainfall to the "act of God principle," which "applies only to events

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(submarine pipelines and the dock). That clause provides in pertinent part:

> [T]he United States shall in no case be liable for any damage or injury to the structure or work herein authorized, which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes and no claim or right to compensation shall accrue from any such damage.

Gov't C.A. Br. 32. In finding this clause inapplicable, the court concluded that the damage sustained by Southern and Hunt "was not a result from future operations undertaken by the Government for the conservation or improvement of navigation or other purposes." Pet. App. A43 (internal quotation marks omitted).

[6] The court described that standard of review as follows:

> A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Pet. App. A9 (internal quotation marks omitted).

in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." *Id.* at A9 (internal quotation marks omitted). The record also made plain that

> [t]he Black Warrior River lock and dam system is not a flood control project; rather, this system is comprised of run-of-the-river facilities. As such, the lock and dam facilities are not designed to accommodate flood waters or to alleviate flooding. The function of the run-of-the-river dams simply is to pass downstream all inflow in excess of that necessary to provide the advertised navigational depth in each dam's upper pool.

Id. at A10. The district court, however, had improperly ignored these critical facts. The record further showed that, during the "critical period [on December 2 and 3], as more water moved down the river as a result of the unprecedented rain, more water was released over the dam, i.e., the flow out of the dam was matching the flow into the lake above the dam." *Ibid.*

After "a thorough review of the record," the court of appeals concluded that it was "left with the definite and firm conviction that the unprecedented rain, rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system, was the inevitable cause of the chain of events in this case." Pet. App. A10. The court of appeals therefore held that the district court "clearly erred by determining that the actions of the United States were the proximate cause of the damages incurred by [petitioners] * * *." *Id.* at A11.[7]

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[7] In light of this disposition, the court of appeals did not address the government's contention regarding the release of liability issued to

ARGUMENT

The court of appeals' decision correctly applies well-settled law governing the review of lower court findings under the "clearly erroneous" standard of review. At bottom, petitioners dispute the court of appeals' assessment of the record evidence on the issue of proximate cause. Further review of petitioners' fact-specific claims is unwarranted.

1. Petitioners principally contend (89-120 Pet. 14; 89-122 Pet. 9-11; 89-123 Pet. 21-32) that the court of appeals erred in setting aside as clearly erroneous the district court's determination that the Corps of Engineers' negligent operation of the lock and dam facilities was the proximate cause of the damages incurred by petitioners. As the court of appeals made clear, however, the district court incorrectly discounted the relevance of several critical factors, particularly the relationship of the unprecedented rainfall to the functions and operations of river's lock and dam system. See Pet. App. A9-A10. Upon a thorough review of the record, the court of appeals thus correctly determined that the premise of the district court's proximate cause finding—that the Corps of Engineers could have operated the lock and dam system to avoid creating the flood conditions that caused the *Caddo*'s accident—was wrong. To the contrary, the record showed that the lock and dam system was neither designed to prevent, nor capable of stemming, the enormous flow of water caused by the sudden rainfall. See *Ibid.*

As the court of appeals determined, a review of the entire record confirmed that the unprecedented rainfall,

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petitioner Southern Natural Gas Company. See note 5, *supra.*

Finally, the court of appeals remanded the case for further proceedings on Parker Towing Company's claim against Warrior & Gulf. See Pet. App. A11-A12.

which created treacherous navigation conditions, not any mishandling of the lock and dam system by the Corps of Engineers, was responsible for setting in motion the various accidents that led to petitioners' damages.[8] The court of appeals was " 'left with the definite and firm conviction that a mistake has been committed.' " *Anderson* v. *City of Bessemer City,* 470 U.S. at 573 (quoting *United States* v. *United States Gypsum Co.,* 333 U.S. at 395). The court of appeals' correct assessment of the record evidence does not warrant further review.[9]

2. Petitioner Warrior & Gulf also contends (89-122 Pet. 18-23) that the court of appeals erred in referring to Alabama state court decisions in determining whether the extraordinary rainfall, rather than the Corps of Engineers' operation of the dam and locks, proximately caused the accidents. That contention is groundless. First, the issue has only limited significance in the context of this case, because the crux of the court of appeals' judgment is that the record does not support the finding that any action taken by the Corps of Engineers was a proximate cause of peti-

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[8] Petitioner Southern Natural Gas Company notes (89-120 Pet. 26) that the district court's determination of negligence in the operation of the system was based on findings of negligent failure to warn as well as negligent operation of the spillway gates. But in any event, the court of appeals concluded that the unprecedented rain "rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system was the *inevitable* cause of the chain of events in this case." Pet. App. A10 (emphasis added).

[9] The court of appeals applied the settled construction of Fed. R. Civ. P. 52(a), which this Court most recently described in *Anderson* v. *City of Bessemer City, supra.* Despite Southern Natural Gas Company's suggestion (Pet. 14-24), this case therefore does not present an occasion for this Court to revisit the issue of appellate review of trial court findings of fact.

tioners' damages.[10] Second, this Court has long acknowledged that the general maritime law of the United States, which petitioners concede governs this case, includes the pertinent decisions of both state and federal courts. See, *e.g., Levinson* v. *Deupree,* 345 U.S. 648, 651-652 (1953); *Just* v. *Chambers,* 312 U.S. 383, 387-392 (1941).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

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[10] For that reason as well, petitioners' contention (89-120 Pet. 24-27; 89-122 Pet. 11-12) that the court of appeals misconstrued Alabama law with respect to the Act of God defense does not call for this Court's review.

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